United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

F989

BRIEF FOR APPELLANTS AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,008

FROSENE FOSTER, *et al.*,

Appellants,

v.

JOSEPH W. CRAWFORD,

Appellee.

Appeal from the United States District Court
for the District of Columbia

SAMUEL INTRATER

ALBERT BRICK

1010 Vermont Avenue, N. W.
Washington, D. C. 20005

Attorneys for Appellants

QUESTIONS PRESENTED ON APPEAL

Where Appellee's automobile — which collided with the rear of Appellant's automobile — was shown to have brakes whose linings were completely worn out, and it was further shown that the wearing out process is a gradual one, during which the brake pedal becomes lower and lower, was a prima facie case made out, from which the jury could infer that Appellee should have been aware of the dangerous and defective condition of his brakes?

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BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

Appellants filed suit against two joint tort-feasors. The lower court directed a verdict in favor of one — appellee herein — and appellants obtained a jury verdict against the other. The only purpose

for this appeal is to protect appellants in the eventuality that this Court might reverse and remand in the appeal filed by the other tort-feasor (No. 21,006). If this Court affirms in the other appeal, this appeal will be dismissed by appellants.

STATEMENT OF THE CASE

Appellant sustained injury when her automobile was struck in the rear by appellee's automobile, which was being brought down a garage ramp by an employee of the garage. Said employee testified that the brakes failed (J.A. 8).

A mechanic who examined the vehicle several days later testified that the brake linings were completely worn out (J.A. 15, 16). He stated that this is a condition which results from long periods of daily use, rather than as a result of a sudden happening (J.A. 21). He testified that as the brake linings become more and more worn, the brake pedal goes lower toward the floor, when depressed (J.A. 17). He testified that with the condition of the brakes in appellee's car, one would have to depress the brake pedal all the way to the floor (J.A. 17). He stated further that these brakes, in their condition, would produce a rasping sound (J.A. 18). That these brakes were subject to intermittent brake failure (J.A. 19) and would probably not operate at five to seven miles per hour going downhill (J.A. 20).

The court directed a verdict in favor of appellee.

ERRORS URGED ON APPEAL

The Court erred in directing a verdict for appellee where the evidence clearly showed that he maintained his vehicle in a defective brake condition, and that such condition should have been known to him, by virtue of the progressively lower position of the brake pedal.

ARGUMENT

The evidence in this case can be summarized as follows: (A) the brakes failed on appellee's car; (B) said brakes were defective, in that the linings were completely worn away; (C) appellee should have been aware of the condition of his brakes, since the wearing-away process occurs over a period of daily use, and as it progresses, the brake pedal goes lower and lower toward the floor. In this case, the pedal went completely to the floor, and also, the brakes produced a rasping sound.

CONCLUSION

Appellants reiterate that they do not actively seek a reversal herein. Appellants have obtained a jury verdict against the other defendant — the garage. Appellants are confident that no error was committed as to said other defendant, and that its appeal — No. 21,006 — will fail. On the other hand, out of an abundance of caution, appellants have taken this appeal as protection in the eventuality that this Court might discover some error in the companion appeal. In that eventuality, appellants would ask for a reversal herein, because of the error committed herein.

If, on the other hand, the other case is affirmed, appellants will dismiss this appeal.

Respectfully submitted,

SAMUEL INTRATER

ALBERT BRICK

1010 Vermont Avenue, N.W.
Washington, D.C.

Attorneys for Appellants

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

FROSENE FOSTER
5316 Wilson Boulevard
Arlington, Virginia
Plaintiff #1,

SIDNEY FOSTER
5316 Wilson Boulevard
Arlington, Virginia
Plaintiff #2,

vs.

KINNEY OF D. C., INC.
A Body Corporate
514 - 11th Street, N. W.
Washington, D. C.,
Defendant #1,

JOSEPH W. CRAWFORD
1700 Pinewood Street
Falls Church, Virginia
(Serve on Director of Traffic),
Defendant #2.

Civil Action No. 446-62

COMPLAINT FOR PERSONAL INJURIES — AUTOMOBILE COLLISION

1. Plaintiff Frosene Foster, hereinafter referred to as Plaintiff #1, and Plaintiff Sidney Foster, hereinafter referred to as Plaintiff #2, are adult citizens of the United States and non-residents of the District of Columbia, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

2. Defendant Kinney of D. C., Inc., hereinafter referred to as defendant #1,is a body corporate having offices and doing business in the District of Columbia, and defendant Joseph W. Crawford, hereinafter referred to as defendant #2, is a non-resident of the District of Columbia, his last known address being 1700 Pinewood Street, Falls Church, Virginia.

3. That on, to wit, November 11, 1960, plaintiff #1 was in an automobile on garage premises operated by defendant #1 at 11th Street, N.W., between E and F Streets, when an automobile owned by defendant #2 and operated by an agent, servant and employee of defendant #1, negligently, carelessly and recklessly ran into and collided with the automobile in which plaintiff #1 was seated and about to operate, and same was due not only as a result of the negligence, carelessness and recklessness of the agent, servant and employee of defendant #1 in operating said automobile at too great a speed and without having proper control of the same, but also due to the negligence, carelessness and recklessness of defendant #2 in that he knew, or should have known by the exercise of due care, that the braking system of his automobile which he had parked with defendant #1 was in a defective condition and that the braking system would not work.

4. That as a result of the aforesaid negligence, carelessness and recklessness of the defendants, or either of them, plaintiff #1 was injured, suffering from a contused sprained left foot, contused right leg and left side of anterior chest wall, strain of all soft tissues of the neck, sprain of lumbar spine, sprain of cervical spine, and that she suffered great pain and mental anguish and will continue to do so in the future; that the injury to her nervous system is permanent, and that she lost great sums of money because of the fact that plaintiff #1 was unable to take on employment which was waiting for her at the time of said collision.

5. That plaintiff #2, as the husband of plaintiff #1, claims damages of the defendants, or either of them, for loss of the society, comfort, consortium,, companionship and services of plaintiff #1, and that

furthermore he was compelled to expend great sums of money for medical and x-ray treatment and attention for his wife, and also for damage to his automobile in which plaintiff #1 was the operator at the time she was struck as aforesaid.

WHEREFORE plaintiff #1 demands a judgment of defendants, or either of them, in the sum of $50,000.00, and plaintiff #2 demands a judgment of defendants, or either of them, in the sum of $25,000.00, besides costs.

BRICK AND INTRATER

By /s/ Albert Brick
Attorneys for Plaintiffs
517 Denrike Building
Washington, D.C. 20005

Plaintiffs demand trial by jury.

ANSWER AND CROSS CLAIM OF
DEFENDANT, JOSEPH W. CRAWFORD

First Defense

The Complaint fails to state a claim against this defendant upon which relief may be granted.

Second Defense

The Defendant, Joseph W. Crawford, admits that he is a non-resident of the District of Columbia and that the amount claimed in this suit is excess of $3,000.00. The defendant further admits being informed on the date of November 11, 1960, that his automobile, which he had previously delivered to the Co-Defendant, the owner and operator of a parking garage, while in the care, custody and control of the said Co-Defendant and while operated by one of its employees, was involved in an accident.

The defendant admits being informed that his automobile was in collision with the vehicle in which plaintiff, Frosene Foster, was seated while this Defendant's automobile was being operated by the Co-Defendant's agent, servant or employee in the course of the Co-Defendant's business. This defendant does not have sufficient information or knowledge to form a belief as to the allegations of injuries and damages alleged to have been sustained by the Plaintiffs and can therefore neither admit nor deny same. This defendant denies every allegation of negligence asserted as to him and every other allegation contained in the Complaint which is asserted as to him.

Third Defense

The accident complained of was caused by the negligence and carelessness of the Co-Defendant or, in the alternative, its negligence contributed to the happening of this accident.

CROSS CLAIM

For his Cross Claim, the Defendant, Joseph W. Crawford, hereby avers as follows:

The vehicle owned by this Defendant was in the care, custody and control of the Co-Defendant at the time of the happening of the accident which is the subject matter of this litigation for a consideration to be paid by this Defendant to the Co-Defendant as part of a parking charge and contract. This Defendant therefore avers that the injuries and damages, if any, sustained by the plaintiffs and caused by negligence, if any, would be the negligence of the Co-Defendant acting through its agent, servant or employee in the course of the Co-Defendant's business. Pleading inconsistently and in the alternative, the Defendant further avers that the negligence, if any, of the said Co-Defendant, Kinney of D.C., Inc., contributed to said accident.

WHEREFORE, Defendant and Cross Claimant, Joseph W. Crawford, demands judgment as indemnification and/or contribution in whole

or in part, for any sums adjudged against this Defendant in favor of the Plaintiff herein.

GALIHER & STEWART

By /s/ William E. Stewart, Jr.
Attorneys for Defendant
1215 - 19th Street, N.W.
Washington, D.C. 20036
FE 7-8330

[Certificate of Service]

EXCERPTS FROM OFFICIAL TRANSCRIPT OF PROCEEDINGS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FROSENE FOSTER, et al., Plaintiffs vs. KINNEY OF D. C., INC., et al., Defendants	Civil Action No 446-62
MARY T. O'DONOGHUE, Plaintiff vs. KINNEY OF D. C., INC., et al., Defendants	Civil Action No. 2968-61

Washington, D. C.
June 25, 1965

* * * * *

70 Whereupon,

FROSENE FOSTER

a plaintiff, recalled as a witness in her own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

* * * * *

78 CROSS EXAMINATION

BY MR. SCHLOSBERG:

* * * * *

86 Q. You did see this vehicle coming down upon you, did you not? A. Yes, at a quick glance.

Q. You looked over your right shoulder? A. Right like that (indicating).

Q. And you saw it coming? A. Right.

Q. During that period of time did you have an opportunity to brace yourself? A. No. All I did was move over to the right in my automobile.

Q. Now, you stated in your testimony that this car was traveling rapidly. How rapidly do you think it was traveling? A. I couldn't testify to that. I knew it was very close upon me and it was coming down fast.

Q. Would think it would be a fair statement, in your opinion, that this car was traveling from five to seven miles per hour?

87 A. No, it would have to be traveling much faster.

* * * * *

97 BY MR. STEWART:

Q. Mrs. Foster, before leaving the garage area where the accident took place on November 6, 1969, you came to know who was the owner of the Pontiac automobile that was in collision with your car, did you not? A. No. I saw him. They said this was the man but I didn't come to know him, no.

Q. Well, I meant it in a sense of identification, not knowing him

in particular? A. Oh.

Q. You heard him say at that time, did you not, that his brakes were good? A. Yes.

Q. Now, when was it in point of time that you were hospitalized in New York in this Madison Hospital? A. A little over two years ago.

* * * * *

162 CHARLES L. BLOW

was called to the stand on behalf of the Plaintiff Frosene Foster, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. INTRATER:

Q. Will you please state your full name and address?

A. Charles L. Blow. 1846 Maryland Avenue, Northeast.

Q. Mr. Blow, directing your attention to November 11, 1960, were you employed at that time? A. Yes.

Q. What was the nature of your employment? A. Parking lot attendant.

Q. For whom did you work on that date? A. Kinney Parking System.

163 Q. And where was their parking lot located? A. 514 11th Street, Northwest.

Q. What type of lot or building was this? Was there more than one floor in which vehicles were parked? A. Yes.

Q. How would the vehicles be delivered from the ground floor to the floor where they were to be parked by the attendants?

A. By the attendants.

Q. They were driven up? A. Yes.

Q. This was not an automatic type of operation, is that correct?

A. No.

Q. Do you recall on that occasion around noon time you being

involved in an accident? A. Yes, I do.

Q. Do you recall the automobile that you were driving at that time? A. Yes.

Q. What type of automobile was it? A. 1957 Pontiac.

164 Q. Do you by chance know the owner of that automobile?

A. Well, I don't know at that time. I know by name.

Q. And who is that person? A. Mr. Crawford.

Q. Would you describe what happened from the time that you went to get that vehicle until the time of the accident? A. Well, I went over to the cashier and got the ticket, caught the belt up to the third floor which was stall 302, and so naturally when you get in the car, the first thing you are required to do is —

* * * * *

Q. At that time, was this vehicle facing in the direction that you were going or did you have to back it out in any way?

165 A. It was facing in the direction I was going.

Q. Did this car to your recollection have an automatic or standard gear shift? A. Automatic.

Q. What did you do after you turned on the ignition? A. I started it up.

Q. And would you describe how you proceeded to drive it downstairs? A. Well, I let the hand brake down, and then I pulled it into gear, and then put my left foot on the brake, and it had good brakes at that time. So as I pulled out of the stall, I met another car coming up, bringing it up to park, and so I had to stop and back up. So as I passed — as he passed, then I started — proceeded on down, and just as I gets to the second floor, the brakes failed.

Q. You say as you got to the second floor, the brakes failed. Were you applying the brakes on the way down between the third and the second floor? A. Yes.

Q. Were they operating during that period of time? A. Yes, they were.

Q. Now, what happened when you say the brakes failed? What happened physically?

166 A. They just went to the floor.

Q. The brake pedal went all the way down? A. Yes.

Q. What did you do then? A. I tried to pull it up. So by the corner of my toe, I did pull it up, and I pumped it a couple of times, and it went back to the floor, and so by that time, I had hit the foot — the foot brake on the Pontiac, you push it with your feet, so I pushed the foot brake, and apparently that twisted the motor or something and the accelerator stuck, and I started blowing the horn, and then I was getting to where you come down the grade, and so I ran into the wall, and tried to hit the wall at that time.

Q. Where was it that you ran into the wall? A. That was at the turn just before I came down on the main floor.

Q. What happened after that? A. So when I hit the wall, I bounced off the wall, and I hit a Mercury that was sitting right there ready to be taken up, and so I was still blowing the horn and come and bounced off the Mercury right down and hit the other cars.

Q. Where was that Mercury seated? A. They have two lanes taking cars up, and so they gives the customer the ticket and they pulls it up to where the driver comes and gets it and takes it up.

167 Q. This was a Mercury that was facing up? A. Yes.

Q. Anybody in that vehicle? A. No.

Q. Now, you and — after you hit the Mercury, what happened? A. Then I came around on the main floor and hit the car that was about to leave.

Q. Did you do anything about changing gears that morning? A. I don't think so.

Q. Do you recall the speed with which you started coming down the ramp? A. From about five to maybe seven.

Q. What was the speed at the time you collided with the wall? A. I would say about five miles an hour.

Q. Now, you say that you tried to aim the car into the wall. Did you turn the wheel all the way around to go into the wall? A. Well, it was going straight towards the wall any way, and you have to make a sharp turn to come down if you are going to come around, and so
168 instead of trying to come down, I tried to go into the wall.

* * * * *

BY MR. INTRATER:

Q. Did you go straight into the wall? A. Well, almost straight.

Q. What happened on that occasion? What happened to the vehicle, specifically? A. When I hit the wall?

Q. Yes. A. It bounced off the wall.

Q. What speed were you going from there on until you hit the Mercury? A. I guess about five miles an hour.

Q. What part of your car struck the Mercury? A. The right front fender, I think. I am not sure.

Q. Of your car that struck the Mercury? A. I think. I am not sure.

* * * * *

169 BY MR. INTRATER:

Q. Did you deliberately strike the Mercury? A. No.

Q. That was accidental? A. Yes.

Q. What happened to the Mercury after you struck it? A. It bounced back a little bit into the other car but not enough to do any damage to it.

Q. Then your car went in what direction? A. Out towards the street to where I hit the other cars.

Q. What speed were you going when you struck the other cars? A. I would say about five miles an hour.

MR. INTRATER: I have no further questions.

170 * * * * *

CROSS EXAMINATION

* * * * *

BY MR. STEWART

174 Q. Mr. Blow, you were familiar with a 1957 Pontiac Automobile and its various controls as of November 11, 1960? A. Yes, sir.

Q. In addition to steering of the car as you have described it for us, pumping of the brakes as you described it, did you try, other than trying to strike against the wall, try any other measures to avoid the accident which happened? A. Yes.

Q. Did you reach for anything on the dash in particular? Do you remember that? A. Well, the only thing was the handbrake and it doesn't work from the dash. It works from the feet.

Q. Did you know that at that time? A. Yes, I knew that.

Q. You wouldn't have reached on the dash for a knob for the handbrake, would you? A. No.

Q. Now, sir, did you by chance take this car up to this stall

175 No. 302 when it was brought in? A. I don't know. I don't think so.

Q. How many other attendants were there working at the garage on that date? Can you tell us that? A. About ten or maybe more.

Q. In any event, you don't recall whether you were the one or not that took it up? A. No.

Q. Now, based on its position as you found it in 302 when you went up to get it, and your own knowledge of the lay-out of this garage, the attendant who had taken it up would have had to drive semi-circular from the first to the third floor, is that correct? A. Yes.

Q. In doing that, was it required in your employment that the car be stopped at each floor? A. No.

Q. Then from its position as you found it, could you tell us — explain to us would the attendant have backed it into that position?

A. He did.

Q. How many ramps were there in this garage, sir?

176 A. Oh, at the top floor, I think ten.

Q. Now, I want to be sure we understand each other. How many ramps were used for up and down traffic? A. You mean to where the car was?

Q. Yes. A. Three.

Q. In parking automobiles, how many ramps could you use to drive up to the third floor? A. Three.

Q. All right. Now, how large an area would you estimate for us was the size of the third floor and the size of the second floor? A. In other words, you mean by about how many cars there were?

Q. How many cars. That would give us a pretty good idea of the size, sir. A. Each floor would hold about 70 or 75 cars.

Q. Do you recall that the Mercury owner was named Gardner? A. No, I don' t.

Q. You don't recall whether he was present when this conversation took place after the accident that you referred to, do you?

177 A. No.

Q. Isn't it a fact that in coming down the ramp, that is, the ramp between the second and first floor, that you struck the Mercury automobile and as a result of striking the Mercury automobile, thereafter, bounced into the wall? A. No, I hit the wall first.

Q. All right. Now, is this a fully enclosed wall that you are referring to, brick wall? A. When you say fully enclosed, what do you mean?

Q. Is it one solid side of a building? A. Yes.

Q. And you went into it almost immediately — I mean head first? A. Almost.

Q. And you were then traveling, your estimate was, about five miles an hour? A. I would say from five to seven at that particular time.

Q. When you pulled Capt. Crawford's automobile out of the stall No. 302, you brought it to a stop, is that correct? A. Yes.

Q. You were still on the level surface? A. Correct.

178 Q. Is that right? A. Yes.

Q. The brakes worked properly? A. Yes.

Q. Did you then have to turn the automobile right or left to approach the ramp that you were going to use? A. Yes.

Q. And traveling some distance to where you enter on to the ramp? A. Yes.

Q. Did you stop again before entering on to the ramp? A. I had to back up as I was meeting a car coming up.

Q. Had you already started down the ramp when somebody was coming back up? A. Yes.

Q. So you stopped on a decline, is that correct? A. Yes.

Q. How steep a decline are these ramps? A. Oh, I really can't estimate how steep they were because I don't know.

Q. Well, can you give us any idea? Use your hands and perhaps show us the grade.

179 A. We had a steep grade like this. (Indicating)

Q. So you stopped the car and backed it up to the third floor to permit this car that was coming up to reach the third floor, is that correct? A. Yes.

Q. Then you started down the ramp again? A. That's right.

* * * * *

REDIRECT EXAMINATION

BY MR. INTRATER:

Q. I am not sure if I recall this: Where did you say the vehicle was when the brakes first failed and —

THE COURT: You mean the vehicle he was driving?

MR. INTRATER: Yes.

THE WITNESS: Just as I was approaching the second floor.

BY MR. INTRATER:

Q. You were approaching the second floor? A. Yes.

Q. Was there anything to prevent your going off the ramp on

180 to the second floor at that time? A. No.

* * * * *

210 DONALD F. MILLER

was called to the witness stand on behalf of the plaintiffs, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. INTRATER:

Q. Mr. Miller, please keep your voice up. Speak a little louder than normal. Would you please state your full name and address?

A. Donald F. Miller, 312 Rollins Street, Falls Church, Virginia.

Q. Mr. Miller, directing your attention to November of 1960, would you state where you were employed at that time? A. At Broad Street Motors in Falls Church, Virginia.

Q. What was your job or occupation at Broad Street Motors?

A. I was the Assistant Body Shop Foreman.

Q. Mr. Miller, how long have you been working with or on automobiles? A. Well, I have been doing it since I was about 12 years old. I am now 34.

Q. Under what circumstances did you start when you were 12 years old? A. Well, my father had a garage in Mount Rainier during World War 2 and I used to help him.

Q. Aside from helping your father when did you first become employed as an automobile mechanic? A. In February of 1946, I went to work for Barry-Pate Motor Company and I was 16.

Q. And was that as an automobile mechanic? A. Yes, sir.

Q. And have you been employed as an automobile mechanic since that time? A. Well, up to 1958, I got out of it and that is when I got in the body shop end of it and I went back in it in 1962 for about six months, and then I changed jobs again to the present job I have.

Q. Now, throughout that period of time, did you have occasion to deal with brake systems of automobiles? A. Yes, I did.

Q. And how many years experience did you have — by 1960, how many years of experience did you have with regard to the brakes of a car? A. Well, I would say in all 15 years.

Q. In other words, throughout that period of time, you dealt with brakes as well as the other parts of cars? A. Right.

Q. Now, on November, 1960, did you have occasion to see an
213 automobile belonging to Capt. Crawford? A. Yes, I did.

Q. Did he bring that automobile in for an estimate? A. Yes, he did.

Q. Do you recall when he brought the automobile in? A. It was a Saturday.

Q. If I suggest the date of November 12, 1960, would that — A. Yes, it was November 12, 1960.

Q. Now, you on Saturday, did you have occasion to examine the brakes of the automobile? A. No, I did not.

Q. Did there come a subsequent time when you did examine the brakes of the automobile? A. Yes, the following Monday.

Q. In other words, two days later you saw the brakes of Capt. Crawford's car, is that correct? A. Right.

Q. Would you describe the condition of those brakes at the time that you examined them? A. The brakes were worn out.

Q. Now please describe to the jury just what brakes consist of.
214 Explain good brakes in operating condition, please. A. Well, you have a round drum and then you have a shoe with lining on it more-or-less like the shoe sole, and you have — each wheel has a piston on it and — a cylinder, that is, and that is supplied pressure by the main cylinder which is supplied by your foot.

As you apply pressure to the main cylinder, it forces the shoe against the drum on each wheel and consequently slows the car down.

Q. Now, the drum, the brake drum, of what material is that constructed? A. It's a high strength metal.

Q. That is metal? A. Yes.

Q. And the brake shoe, what material is that constructed of?
A. It's metal, also.

Q. Now, is there anything — strike that. In the operation of the brakes, the brake shoe is forced against the brake drum, is that correct? A. Yes.

Q. Is there anything between the metal brake shoe and the metal brake drum?

215 A. Yes, the asbestos lining.

Q. That is normally called brake lining? A. Right.

Q. And what does this brake lining look like? You mentioned it is asbestos. What does it look like? A. It is just a hard fiber material like. There are all different types. There is what we call good lining and then cheap lining and then there is real expensive lining.

Q. But this is a hard fiber material which — it's a curved structure? A. Right. It is molded to fit the shoe. In other words, the shoe is more-or-less like made in a half moon shape and the lining is the same way.

Q. So you have sort of a half moon shaped lining that fits on the shoe and is between the shoe and the brake drum? A. Right.

Q. Approximately how thick in depth now is this lining when new? A. I would say it is about 3/16's.

Q. Of an inch? A. Yes.

Q. What happens to the lining as the automobile is operated and

216 the brakes are in usage? A. Well, the lining wears.

Q. And eventually the lining wears away completely if not replaced, is that correct? A. That's correct.

Q. Now, how much, if any lining, was there on the brakes of this vehicle when you examined them? A. Well, of course, it has been four and a half years now. To my recollection, I don't believe there was any lining on the particular wheel that I looked at.

Q. Now, what about the condition of the brake shoe and brake drum as you examined them. A. Well, the brake shoe was scored and the drum was scored, also.

Q. Now, would you explain what you mean by scored? A. Well, when the lining wears out and there is nothing there for the shoe to ride against, the drum, it cuts the drum and you have a metal to metal condition.

Q. In other words, previously this fiber was like a buffer between the two but now you have metal working against metal and this mars the metal and that is what you call scoring, is that correct?

217 A. Right. It would be like your car if your tire came off. You would be running on the rim.

Q. Under average driving conditions with the average person who is not necessarily too easy or not necessarily too hard on brakes, can you state in your opinion how long this lining usually wears -- lasts before it wears away? A. Well, I would say probably 18 to 20,000 miles. It just -- it all depends on the person using it.

Q. Suppose you had a person who is very tough on brakes and rides the brakes all the time and slams them on, can you state what in your opinion and experience the earliest that such linings have to be replaced? A. Well, we had put lining on under ten-thousand miles.

Q. Would you say that is an unusual driver? A. Yes, I would.

Q. Now, would you please describe to His Honor and the Jury just what effect there is on the brake pedal itself when you apply the brake pedal, what effect is there as this lining is wearing away?
A. Well, the pedal goes further down as you apply it. This is what you call less pedal reserve.

Q. And in short, when the brake lining is new, just stepping

218 slightly on a pedal will cause the brakes to hold, is that correct?
A. Yes, right.

Q. Then as the lining wears away, you have to step farther

and farther down on the pedal for the brakes to hold? A. Actually the pedal travels further as you apply the brake.

Q. Now, what about the brakes that you observed — with regard to the condition of these brakes, how far would these brakes have had to go down before the brakes would hold the shoe and the drum alone in contact? A. Well, in the condition they were in, I would say that the pedal would probably have to go to the floor if — I will say almost to the floor and probably to the floor.

Q. Now, these brakes will still actually operate just on the drum and the brake shoe, isn't that correct? A. Right.

Q. But you have to step almost to the floor in that regard?

A. Right.

Q. Now, with regard to an indication to the operator of a vehicle that the brakes are worn, what besides the fact that the pedal

219 goes so far down, what else is there to give warning that the brakes are worn? A. Well, you have on this particular vehicle, the condition like this, you have a rasping sound, a scraping sound as you apply the brakes. This would be the metal shoe touching the metal drum.

Q. In other words, you step on the brakes, the brakes would rasp or give a screeching sound of metal on metal? A. Yes, right.

* * * * *

BY MR. INTRATER

Q. Assuming that this vehicle was being driven down a ramp, a slightly tilting ramp approximately the way my hand is, like so, down a ramp at a rate of some five to seven miles per hour, could brakes under such a condition still hold? A. Well, yes. You just have to apply more pressure and — in other words, it is just like you start down a hill, and you need more pressure to stop than you do on level ground.

* * * * *

220 CROSS EXAMINATION

BY MR. SCHLOSBERG:

Q. Mr. Miller, did you examine all four wheels?

221 A. Now, you have asked me something now.

Q. How many wheels do you recall examing? A. I looked at both front. I won't say positively that I looked at the rear.

Q. And did you also look at the drums? A. Yes, I did look at the drums.

Q. Did you also look at the front wheel cylinders? A. Yes.

Q. Now, do you recall whether the mileage was — what the mileage was on that vehicle when you examined it? A. No, I do not.

Q. Do you recall whether the mileage was at or in excess of 40,000 miles? A. No, I do not.

Q. Can a vehicle with the brakes as such as the one you have described, be subject to intermittent brake failure? A. In my opinion, yes.

Q. Does this mean they could not work at certain times and could work at other times? A. Yes, they could.

* * * * *

222 BY MR. STEWART:

Q. That would all be dependent upon the speed at which the vehicle was being operated,isn't that true, Mr. Miller? A. Well, this would have a lot of bearing on it. There are a lot of elements involved, too.

Q. Well, and furthermore, for you to be able to answer such a question, you would have to know what is meant by the term brake failure, isn't that true? A. Yes, right.

Q. We know there are many instances where someone strikes the vehicle in the rear of a stopped automobile and he said his brakes failed but there are brakes on that vehicle? A. Right.

Q. And your testimony as you have expressed here today, Mr. Miller, is predicated in part upon your experience and ability

but also upon your visual observation of two shoes and two drums of this automobile. Is that right? A. Well, it would — well, it would be four shoes and two drums, two shoes on each drum.

Q. The front end of the vehicle? A. Right.

Q. And predicated upon that examination you agree that there was enough brake available to the operator of this automobile vehicle

223 to stop it if the car was driven at a reasonable rate of speed.

A. Well, that I can't say positively. I mean this if —

Q. Certainly if driven at a slow rate of speed such as five to seven miles per hour, the car had adequate brake facilities to stop the car. You would agree to that, would you not? A. Oh, yes, I would say yes to that.

Q. All right, sir.

MR. STEWART: Thank you, Mr. Miller.

THE COURT: Anything further? Mr. Schlosberg, do you have something further?

MR. SCHLOSBERG: Yes.

BY MR. SCHLOSBERG:

Q. Would your testimony be influenced if the question that Mr. Stewart asked you were to be prefaced by the remark that this car while driving five to seven miles an hour was coming down an incline such as that. (Indicating) Would that have any effect on its stopping power or ability? A. Well, yes, I would say yes because any time you go down a hill or anything, you gain — well, momentum.

Q. In other words, the pressure brought upon these brakes

224 would be greater, is that true? A. Yes, that is correct.

Q. And if the brakes were in the condition that you described as being badly worn, they would be less able to stop coming down an incline such as that than on a straight level? A. You would have less braking power.

MR. SCHLOSBERG: Thank you.

BY MR. STEWART:

Q. We again come back to the miles per hour, whether it is

on a level surface or up grade or down grade, don't we, sir?

A. Right but this also — metal to metal does not give you the stopping condition — condition that you have with asbestos lining on the shoe.

Q. We understand that but we are still directing stopping power to the miles per hour. That is the way it is measured, is it not?

A. Yes, that is correct.

MR. STEWART: Thank you.

REDIRECT EXAMINATION

BY MR. INTRATER:

Q. This condition of the wearing out of the shoe lining, is that something that could be caused by a sudden emergency or slamming on the brakes or is that something that results from continual usage

225 of the brakes? A. No, it is caused from wear. Daily use over a period of time.

* * * * *

323 MARY T. O'DONOGHUE

resumed the stand, previously sworn, was examined and testified as

324 follows:

* * * * *

325 CROSS EXAMINATION

BY MR. SCHLOSBERG:

* * * * *

349 Q. Now, let me go back to November 11, 1960, if I may, and ask you, Miss O'Donoghue, during this period of time that you were still in the garage following the accident, did you see Capt. Crawford there? A. Well, that is almost five years ago but I did see the owner of the car but I mean, I wouldn't be able to remember if it was the same man or not.

Q. All right. Now, did you observe that car which had come down the ramp and was in collision with several other cars as has been described, did you observe that car, a '57 Pontiac, after the accident?

A. Yes.

Q. And was it still on this first floor level, that is, where your car was and Mrs. Foster's car was? A. When I first saw it, Capt. Crawford's car, the right front fender was up against my — no, it was his left front fender, and it was up against the right rear bumper of my car, and the right front part of his car was in the young lady's car.

Q. Now, did there come a time when you saw an employee of
350 Kinney get behind the wheel of that car and drive it on the level of this first floor? A. Yes.

Q. After this accident? A. Yes.

Q. Did you see that employee back up the car and bring it to a stop? A. I did.

Q. Did you see that employee drive that car forward and obviously apply the brakes and bring the car to a stop? A. I did.

Q. Did you see that employee then drive that car down a ramp to a lower level? A. I saw him heading towards the ramp in the lower level. Now, whether he went down completely or not, I do not know because at that time I think I walked away.

Q. All right, but he was obviously checking in your presence and in the presence of others the brakes on this vehicle? A. That is correct.

Q. And the vehicle did stop on each occasion it was so tested?
351 A. Yes, it did.

* * * * *

366 JOSEPH W. CRAWFORD

was called to the witness stand on behalf of the Defendant Kinney, was duly sworn, examined and testified as follows:

* * * * *

367 CROSS EXAMINATION

BY MR. COLLINS:

Q. Capt. Crawford, what was your — the entent of your daily average or weekly average driving on that car? A. At that time

I drove it one or two times a week to the Pentagon from Falls Church and back home plus other incidental driving.

Q. Would you like to estimate the approximate number of miles in a week? A. Oh, about a 100.

Q. Now, Captain, did you drive this car to this garage on 11th Street in November, the 11th, 1960? A. I did.

* * * * *

368 DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

Q. And do you know approximately how many miles that is from Washington? A. I don't know. I would guess it would be in the neighborhood of 15 miles.

Q. Now, Captain, when you came into Washington, about what time was it? A. Mid-morning, perhaps around 10:30.

Q. And do you recall what the condition of the traffic was?

369 A. Quite heavy.

* * * * *

371 Now, Captain, when you proceeded from your home to the garage, did you have an occasion to stop at any stop lights? A. Yes.

Q. And can you tell us approximately how many? A. As I recall, there are about 15 or 20 lights between Falls Church and downtown Washington.

* * * * *

372 Q. Captain, can you tell us what the speed limits are from Falls Church to Washington? A. No, I cannot.

Q. Well, now, as you travel along, did you have occasion to apply your brakes? A. Yes.

Q. And did you have occasion to bring your car to a complete stop? A. Yes.

Q. Now, did you — did your brakes when you applied them, did

that bring your car to a complete stop? A. Yes.

Q. Were they — were they operating normally?

373 A. As far as I know.

Q. Did you have any screeching or any unusual noise when you applied the brakes? A. No.

Q. Will you state whether or not there was any indication as to whether there was anything wrong with the brakes? A. Not as far as I know.

Q. Captain, were you in the garage after this incident occurred? A. I was.

Q. Well, will you tell us whether or not you saw anybody operate the automobile after the collision? A. I did.

Q. Will you tell us whether or not you saw any testing take place? A. I did.

Q. And will you tell us what you observed? A. I observed the employee of Kinney get in my car, stop and accelerate and accelerate at a fairly rapid speed, apply the brakes and all four wheels locked leaving skid marks on the concrete inside of the garage.

Q. Is that the total of what you saw? A. It is —

THE COURT: Did you intend to say something else?

THE WITNESS: Subsequent to that it was driven —

BY MR. COLLINS:

Q. Go ahead. A. Subsequent to that the same driver drove the car down another ramp from the ground level to the basement and at the bottom of that ramp there there is a block wall and he applied the brakes and stopped the car without hitting the wall.

Q. Now, Captain, did you drive your car from that garage? A. I did.

Q. Where did you drive it to? A. Falls Church.

Q. Did you — will you tell us whether or not you had occasion to stop on the way home? A. I did.

Q. Did you encounter any difficulty in applying your brakes?

A. I did not.

* * * * *

375 CROSS EXAMINATION

BY MR. SCHLOSBERG:

Q. Now, Captain, you saw the garage attendant or garage attendants pump those brakes after the brakes failed, didn't you? A. No, I did not.

Q. You did not? You were present when this was done, were you not? A. When what was done?

Q. Pumping of the brakes after the brakes failed? A. I am not aware that the brakes were pumped.

THE COURT: Did you see anyone pump the brakes?

THE WITNESS: I saw no one pump the brakes.

BY MR. SCHLOSBERG:

Q. Captain Crawford, you know as a matter of fact that those brakes were defective and worn, don't you? A. I know nothing of the kind.

* * * * *

378 REDIRECT EXAMINATION

BY MR. INTRATER:

Q. Captain, you were previously asked if you operated your brakes after leaving the scene of the accident and you testified that you did, and you also testified that you saw nobody at the scene pump the brakes.

Now, when you were driving away, and you applied the brakes, did you pump the brakes in order to get them to operate? A. As far as I know, I did not.

* * * *

BRIEF FOR APPELLEE, JOSEPH W. CRAWFORD,
SUBMITTED UNDER RULE 18(d)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,008

FROSENE FOSTER, *et al.*,

Appellants,

v.

JOSEPH W. CRAWFORD,

Appellee.

Appeal from the United States District Court
for the District of Columbia

WILLIAM E. STEWART, JR.
RICHARD W. GALIHER
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STATEMENT OF QUESTION PRESENTED

In the opinion of Appellee, the question is, was there sufficient evidence presented by Appellants to require the Court to submit to the jury Appellants' contention that the brakes on Appellee's vehicle were defective and that Appellee knew of this condition prior to delivery of his vehicle to a parking garage operator or that he should have known of that condition prior to delivery of the vehicle to the parking garage operator.

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OTHER AUTHORITIES

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Appellee.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE
SUBMITTED UNDER RULE 18(d)

PRELIMINARY STATEMENT

Appellants, husband and wife, were two of three Plaintiffs below in consolidated actions brought against Appellee, the owner of an automobile, and a second Defendant, Kinney of D. C., Inc., the

owner-operator of a parking garage, for injuries and damages alleged to have been sustained by Appellants as a result of an accident which occurred within the garage premises of Kinney of D. C., Inc., when Appellee's vehicle was being operated by an employee of said Kinney within the scope and course of his employment. Appellants contended that the garage owner-operator was negligent in the operation of the vehicle and/or that Appellee was guilty of negligence in that he knew, or should have known, that his vehicle, delivered into the care and custody of the garage owner-operator, had defective brakes. The case was tried before a Court and jury and at the conclusion of Appellants' case (and that of Appellant, Mary T. O'Donoghue, No. 21,009), the trial Court directed a verdict in favor of Appellee. The trial continued and the Court subsequently directed a verdict in favor of Appellee on the crossclaim of the garage owner-operator, Kinney of D. C., Inc., against this Appellee. (See Appeal No. 21,006, Kinney of D. C., Inc. v. Frosene Foster, *et al.*, and Appeal No. 21,007, Kinney of D. C., Inc. v. O'Donoghue, *et al.*) Ultimately, the issues between Appellants and the then-remaining Defendant, Kinney of D. C., Inc., were submitted to a jury. The jury was unable to arrive at a verdict and a mistrial was declared. Subsequently, Appellants' action, and, also, the action of Appellant O'Donoghue, again came to trial before a Court and jury, in which trial, Appellee was not a party, and these Appellants and the Appellant, Mary T. O'Donoghue, obtained substantial judgments against Kinney of D. C., Inc. (See Kinney of D. C., Inc. v. Frosene Foster, *et al.*, No. 21,006, and Kinney of D. C., Inc. v. O'Donoghue, *et al.*, No. 21,007) Appellants, as well as Appellant, O'Donoghue, now appeal from the direction of the

verdict in favor of Appellee in the first trial as a protective measure only in the event that this Court should reverse the judgments obtained by them against Kinney of D. C., Inc., the subject matter of the appeals brought by Kinney of D. C., Inc. in Nos. 21,006 and 21,007.

COUNTER-STATEMENT OF THE CASE

During the course of the presentation of Appellants' case, the Appellant, Frosene Foster, testified that just prior to the happening of the accident, and while she was seated in her automobile, she looked over her right shoulder and saw the vehicle (of Appellee) coming towards her; that it was travelling rapidly and that when she saw it, it was very close upon her and it was coming down the ramp fast. It was travelling much faster than 5-7 miles per hour (J.A. 6). Mrs. Foster also testified that before leaving the garage premises, the owner of the automobile that had collided with hers, Appellee, Crawford, was identified to her and she heard him say that his brakes were good (J.A. 7).

The garage employee, Charles L. Blow, who was called as a witness on behalf of Appellants, described his duties as that of a parking lot attendant, explaining that vehicles delivered for parking would be taken from the ground floor to other floors within the building and there parked by the attendants (J.A. 7). On November 11, 1960, he was the attendant who was given the ticket to obtain a 1957 Pontiac owned by Appellee and he caught a conveyor belt up to the third floor and went to stall #302 where the car was parked (J.A. 8). He got behind the wheel of the car, let the handbrake off, put the car into gear and pulled forward and, at that

time, he said the car had good brakes (J.A. 8). After pulling out of the stall and starting towards the point of delivery with the car, he met another vehicle coming up the ramp and he had to stop and back up the car and then, after this car passed, he proceeded on down and just as he arrived at the second floor, the brakes failed (J.A. 8); that as he travelled from the third to the second floor, he was applying the brakes and that they were operating (J.A. 8). He described the brake failure as consisting of the brake pedal going all the way to the floor and that he tried to pull up the pedal with the corner of his toe and succeeded in doing so and pumped the brake several times but that it went back to the floor; that he also pushed the foot brake and that this seemed to twist the motor or something and that the accelerator stuck and that he started blowing the horn and then he ran into a wall purposely, bounced off the wall and struck against a Mercury automobile that was waiting to be taken up the ramp and then bounced off the Mercury and struck the car of Appellants (J.A. 9). He further testified that as he started down the ramp, he was travelling about 5-7 miles per hour and that at the time of the collision with the wall, he was travelling about 5 miles per hour (J.A. 9). After striking the wall and, while proceeding towards the point of collision with the Mercury automobile, he was travelling about 5 miles per hour (J.A. 10). When he struck Appellants' car, he was travelling about 5 miles per hour.

On cross-examination, Mr. Blow testified that the attendant who had taken Appellee's car from the ground floor to the third floor would have driven it in a semi-circular fashion until he arrived at a point in the vicinity of stall #302, and then would have

backed the automobile into that stall (J.A. 11). There were ten floors within the garage and three ramps for up and down traffic (J.A. 11, 12). Each floor in the garage would hold 70-75 automobiles (J.A. 12). The wall which he struck against was a solid wall and constituted one side of the building and the collision with that wall was nearly head-on (J.A. 12). The witness further testified that in pulling Appellee's automobile from stall #302, he brought it to a complete stop on the level surface, at which time the brakes worked properly (J.A. 12, 13). He then had to turn the automobile to approach the ramp. He then started down the ramp and, because of the oncoming automobile which was being taken up the ramp, he had to stop on a steep decline, which was between the second and third floor (J.A. 13). He stopped the Appellee's car and backed it up to the third floor to permit the other car to pass and then again started down the ramp (J.A. 13).

On redirect examination by Appellants' counsel, the witness testified that the brakes first failed as he approached the second floor and he admitted that there was nothing to prevent him from turning off the ramp onto the second floor at that time (J.A. 13, 14).

Donald F. Miller testified on behalf of Appellants, that Appellee's automobile was brought to his place of business for an estimate on Saturday, November 12, but that he did not examine the brakes of that vehicle on that date but that he did on the following Monday. The witness, an automobile mechanic, described, generally, the presence of brakes on all four wheels of a vehicle, as well as asbestos lining on the metal brake shoes. Initially, when

questioned with respect to the lining on the brakes of Appellee's vehicle, the witness testified that he did not believe that there was any lining on the particular wheel he looked at (J.A. 16). When questioned with respect to the brakes on Appellee's vehicle, the following appears of record:

> Q. Now, these brakes will still actually operate just on the drum and brake shoe, isn't that correct? A. Right.
>
> Q. But you have to step almost to the floor in that regard? A. Right. (J.A. 18)

Again Appellants' counsel questioned his witness:

> Q. Assuming that this vehicle was being driven down a ramp, a slightly tilting ramp approximately the way my hand is, like so, down a ramp at a rate of some five to seven miles per hour, could brakes under such condition still hold? A. Well, yes. You just have to apply more pressure and — in other words, it is just like you start down a hill, and you need more pressure to stop than you do on level ground, (J.A. 18)

On cross-examination by counsel for Kinney of D. C., Inc., the witness testified that he had looked only at the front wheels. He did not recall looking at the rear wheels (J.A. 19). On cross-examination by Appellee's counsel, it was developed, though the witness did indicate that brakes, as described, could be subject to intermittent brake failure, he readily conceded that he would have to be told what is meant by the term brake failure (J.A. 19). Further, the speed at which the vehicle was being driven would have a great deal of bearing upon his opinion, and he readily

conceded knowledge of many instances of rear-end collisions where the operator contended the brakes had failed when, in fact, the brakes on the vehicle were in operating condition (J.A. 19). The witness further testified that the opinions expressed by him were predicated upon visual observations of the front end of the vehicle alone, *i.e.*, the drums and the four brake shoes on each of the two front drums (J.A. 20). The witness definitely testified that if the vehicle of Appellee had been driven at a speed of 5-7 miles per hour, the car had adequate brake facilities to stop the vehicle (J.A. 20). Stopping power of the vehicle would be measured in terms of the speed (miles per hour) (J.A. 21).

On cross-examination of Appellant, O'Donoghue, by counsel for Appellee herein (erroneously indicated in the Joint Appendix as cross-examination by counsel for Kinney of D. C., Inc.), she testified that she saw Appellee at the scene of the accident and that she also observed his 1957 Pontiac at the scene after the accident (J.A. 21). In fact, she indicated that a portion of Appellee's vehicle was against a portion of her car (J.A. 22). Following the accident, she saw an employee of Kinney of D. C., Inc. get into Appellee's car and drive it on the level of the first floor; she saw him back up the automobile and bring it to a stop and saw him drive it forward, apply the brakes and bring it to a stop. She also saw him drive the automobile down a ramp towards a lower level. This employee was obviously checking the brakes on Appellee's vehicle and, from her observation, the vehicle came to a stop on each occasion it was tested (J.A. 22).[1]

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[1] This employee of Kinney, likewise referred to in the testimony of Appellee, was otherwise unidentified and was not produced for testimony at trial.

After the Court had directed a verdict in favor of Appellee in Appellants' case, the then-remaining Defendant, presenting its evidence on its crossclaim, called Appellee as a witness and briefly inquired of Appellee. Counsel for Appellant, O'Donoghue, began cross-examination but, desiring to exceed the scope of direct examination, then made Appellee a rebuttal witness on behalf of Appellant, O'Donoghue.

The Appellee testified that his residence was located about fifteen miles from Washington and that he had travelled to Washington on the day of this occurrence, arriving about 10:30 A.M.; that traffic was quite heavy at the time. During the course of this approximately fifteen-mile journey, he was required to stop his automobile for 15-20 traffic lights between Falls Church and downtown Washington; that he had occasion to apply his brakes and bring his car to a complete stop and did so, and that the brakes were operating normally (J.A. 23, 24). The witness further testified that there was no screeching or unusual noise associated with the application of the brakes, nor any indication to him that there was anything wrong with the brakes. Following the happening of the accident, the Appellee described observing within the garage, an employee of Kinney of D. C., Inc. get into his automobile, "stop and accelerate, and accelerate at a fairly rapid speed, apply the brakes and all four wheels locked, leaving skid marks on the concrete inside of the garage." (J.A. 24) In addition, the same Kinney employee drove the automobile down another ramp from the ground level to the basement "and at the bottom of that ramp, there is a block wall and he applied the brakes and stopped the car without hitting the wall." Subsequently, Appellee drove his automobile

from the garage to Falls Church. He had occasion to stop the vehicle on the way home and did not encounter any difficulty in applying the brakes (J.A. 24, 25). In response to the direct question as to his knowledge of the condition of the brakes, he denied any knowledge of the brakes being defective or worn (J.A. 25).

SUMMARY OF ARGUMENT

1. The evidence did not establish that Appellee, Crawford, knew, or in the exercise of reasonable care, should have known of the alleged defect in his braking system.

2. The Appellants did not establish that the alleged brake failure of the Crawford vehicle was the proximate cause of the accident but, on the contrary, did establish that the proximate cause of the accident was the negligent operation of the vehicle by the parking lot attendant.

ARGUMENT

I.

At the outset, it is Appellee's position that consideration of the over-all evidence in this case did not establish the existence of a defect in the braking system of the vehicle of Appellee. Though it is true that the garage attendant claimed that the brakes of the vehicle had failed, this was the single item submitted by Appellants to establish such a contention, i.e., with regard to the condition of the brakes at the time and place of the accident. The examination of the front wheels of the vehicle, made several days thereafter by the mechanic-witness, Miller, injected nothing more than an opportunity for speculation in the case. Opposed to the claim of the garage attendant was

testimony of Appellant O'Donoghue and Appellee Crawford as to tests made on the car immediately following the accident and the sufficiency of the brakes to stop the vehicle on a level surface and on a downgrade surface. Also opposed to the claim of the garage attendant was his own incredible story as to how he operated this vehicle in attempting to bring it down from the third floor to the first floor level. Consequently, Appellee basically urges the insufficiency of proof to establish the existence of an alleged brake defect in his vehicle at the time and place of the accident.

Assuming, however, for the purposes of argument herein, that the brakes on Appellee's vehicle could be characterized as defective, then Appellee urges that the evidence did not establish that he knew, or in the exercise of reasonable care, should have known of the alleged defect in his braking system.

The parties to this appeal are apparently in agreement that Appellee's liability, if any, must be predicated upon his knowledge, either actual or constructive, of a defective condition respecting the braking system of the automobile. This position is in accord with the great weight of authority. See 8 *Am. Jur.* 2d, Automobiles and Highway Traffic, §700; *Annotation*, 170 A.L.R. 615, 619 and 667; *Annotation*, 46 A.L.R. 2d 427, 428; *Ravin v. Hanson*, 142 A.2d 830; *Boyd v. Reed*, 143 A.2d 516; *Knox v. Akowskey*, 116 A.2d 406; *Kaplan v. Stein*, 84 A.2d 81.

There is no evidence whatsoever that the Crawford vehicle had a history of brake malfunction or, indeed, that there had ever been a single instance of the brakes failing to operate properly.

In referring to the day of the occurrence, Appellee, Crawford, testified on direct examination by Appellant, O'Donoghue, that he had driven from his home in Falls Church to the garage on 11th Street, where the accident occurred, a distance of about fifteen miles, through heavy traffic and had passed "15-20" stoplights and that, in the course of this trip, he had had occasion to apply his brakes and to bring his

car to a complete stop; and that on these occasions the brakes operated normally and without any unusual noise. He stated that as far as he knew, there was no indication of anything wrong with the brakes.

The employee of the parking lot, Mr. Charles Blow, said that when he first got into the Crawford automobile, it had good brakes and that in bringing the car down from the third level, he met another car coming up, necessitating his having to stop the Crawford vehicle on a decline and back it up. There was no indication that the attendant who parked the Crawford vehicle had experienced any difficulty with the brakes.

From this testimony, it is apparent that if the brakes on the Crawford vehicle did, in fact, fail to function properly, it was an isolated instance and one which Appellee Crawford could not have reasonably been expected to anticipate.

The cases cited above add strong support to Appellee's contention that for a Plaintiff to prevail in this jurisdiction on the issue of notice, or constructive notice, he must present stronger evidence than that produced by Appellants in the trial of this case.

II.

The Appellants did not establish that the alleged brake failure of the Crawford vehicle was the proximate cause of the accident. On the contrary, the evidence established that the proximate cause of the accident was the negligent operation of the vehicle by the parking lot attendant.

The evidence alluded to above clearly demonstrates that there was no prior indication of trouble with the brakes on the Crawford vehicle. There is uncontradicted testimony that immediately following the accident, the brakes were tested and performed satisfactorily. In this regard, Appellant, O'Donoghue, stated that following the accident, she saw

an employee of the parking garage drive the car forward and obviously apply the brakes and bring the car to a stop. This was corroborated by the testimony of Appellee, Crawford, to the effect that he saw an employee of Kinney get into his car, accelerate at a fairly rapid speed and apply the brakes, at which time all four wheels locked, leaving skid marks on the concrete.

An automobile mechanic, called by Appellants Foster, testified on cross-examination, that if the automobile had been operated at a slow rate of speed, it had adequate brake facilities to bring the car to a stop.

His recollection was that he examined both front wheels and that he did not "believe there was any lining on the particular wheel that I looked at." He then proceeded to testify, in general terms, as to indicia to the operator of a vehicle on which the brakes were worn. There would be, he said, a rasping sound and "the pedal goes further down as you apply it." However, this witness had fifteen years experience with regard to automobile brakes and to suggest that these "indicia" would have any significant meaning to the average motorist is pure speculation.

The suggestion that the vehicle was not being operated at a reasonable rate of speed is further supported by the testimony of Appellant, Frosene Foster, that when she first saw the Crawford vehicle, it was coming down fast — travelling much faster than 5-7 miles per hour. It should be remembered that she did not see the Crawford vehicle until after it had struck a wall and another automobile. The parking lot attendant gave testimony that he drove "almost straight" into the wall, but bounced off and proceeded to strike a Mercury vehicle on the right front fender. It is difficult to comprehend how the Crawford vehicle could have continued on its journey and inflict heavy damage after coming into contact with these two stationary objects, had it been operated at only a moderate rate of speed.

The attendant, Mr. Blow, also testified that the brakes failed as he was approaching the second floor and that there was nothing to prevent his going off the ramp onto the second floor at that time. However, the attendant,

Mr. Blow, did not go off the ramp but instead continued down to the first level. There is no evidence that he, after realizing that the brakes failed, made any attempt to stop the Crawford automobile by utilizing the emergency brake.

The incredible version of this occurrence, as presented by the employee of Kinney of D. C., Inc., in and of itself compels the conclusion that it was speed rather than a lack of braking power that caused the accident.

The Trial Judge was apparently convinced of this by that testimony, the physical facts, and the failure of anyone on behalf of Appellants or Kinney of D. C., Inc. to deny the testimony of Mrs. O'Donoghue and Captain Crawford, that his vehicle was tested after the collision and the brakes were found to be satisfactory. The Trial Judge was not obliged to automatically accept a contention on an issue of fact. See *Washington, Marlboro & Annapolis Transit Co. v. Maske*, 89 U.S. App. D.C. 36, 190 F.2d 621.

The law is well settled in this jurisdiction that when a Plaintiff produces evidence that is consistent with an hypothesis that the Defendant is not negligent and also with one that he is, his proof tends to establish neither. *Capital Transit v. Gamble*, 82 U.S. App. D.C. 57, 160 F.2d 283; *Safeway Stores, Inc. v. Preston*, 106 U.S. App. D.C. 114, 269 F.2d 781. In the case of *Selby v. S. Kann Sons*, 64 App. D.C. 36, 73 F.2d 853, it was held, that where under Plaintiff's evidence an accident may be due to any one of several causes, for some of which the Defendant is legally responsible and for some of which he is not, Defendant is entitled to a directed verdict.

In a case involving a similar fact situation, the Municiple Court of Appeals held that the Trial Court was entitled to believe Plaintiff's testimony that his foot brake was in working order when he delivered

the automobile to the garage, or at least he believed it to be in working order, and was further entitled to take into consideration the natural inclination of a parking attendant to exculpate himself when weighing his testimony. *Columbia v. Kettler*, 67 A.2d, 267. In that case, there was undisputed evidence that following the accident, the foot brake would not work.

Even if we assume that the brakes on the Crawford vehicle did malfunction, the negligence of the attendant was the proximate cause of the collision and constituted an intervening agency that could not reasonably have been anticipated by the Appellee. See *Ravin v. Hanson, supra.* This negligence consisted of operating the automobile at an excessive rate of speed, failing to drive the vehicle off the ramp at the second level when there was an opportunity to do so and thereby avoid the collision and in failing to apply the emergency brake.

This contention is supported by the jury verdict rendered in the later trial in which Appellants Foster and O'Donoghue were Plaintiffs and the parking garage was the Defendant and which arose from the same occurrence that is the basis of this suit. In the later trial, a jury, after hearing all the evidence on both sides, rendered a verdict in favor of Foster and O'Donoghue against the parking garage. Therefore, it is to be assumed that that jury was convinced that the parking attendant was negligent and that his negligence was the proximate cause of the accident.

It is significant to observe that in the appeals taken by Kinney of D. C., Inc. from these jury verdicts against it (Nos. 21,006 and 21,007), that Appellant, Kinney of D.C., Inc., apparently recognizes its liability to Appellants Foster and O'Donoghue for there is no contention made

that the Trial Court should have directed a verdict in favor of Appellant Kinney of D. C., Inc. The points on appeal in those causes are purely evidentiary.

CONCLUSION

It is respectfully submitted that the Trial Court correctly ruled upon Appellee's motion and thus avoided affording a jury an opportunity to speculate with respect to non-existent evidence. The Trial Court should be affirmed.

Respectfully submitted,

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